

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

Petition of Verizon Telephone Companies )	
)	
For Forbearance Under 47 U.S.C. § 160(c) )	
)	WC Docket No. 04-440
From Title II and Computer Inquiry Rules )	
)	
With Respect to Their Broadband Services )	

**REPLY COMMENTS OF**

**THE PENNSYLVANIA PUBLIC UTILITY COMMISSION**

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## **Introduction**

The Pennsylvania Public Utility Commission (PaPUC) appreciates this opportunity to file Reply Comments with the Federal Communications Commission (FCC). These Reply Comments respond to the FCC Notice on the Motion of Covad Communications, Inc. (Covad), NUVOX Communications, Inc. (NUVOX), and XO Communications, LLC (XO) For Expedited Order on Verizon's Petition for Forbearance (CLEC Petition) at Docket WC 04-440 (the Verizon Forbearance or forbearance). Verizon obtained forbearance by operation of law on March 20, 2006 under Section 10(c), 47 U.S.C. § 160(c). The FCC Notice in DA 07-3473 released on July 30, 2007 seeks comments on a CLEC Petition asking for an order to provide certainty on what was decided in that forbearance.

As an initial matter, the PaPUC Reply Comments should not be construed as binding on the PaPUC or any individual Commissioner in any proceeding pending before the PaPUC. The positions taken in the Reply Comments could change in response to subsequent events, including developments at the state and federal levels.

## **Executive Summary**

The PaPUC Reply Comments conclude that the FCC has authority to issue an order as a matter of law. The FCC must issue an order providing clarity on the forbearance granted by operation of law. The clarity must address the relationship between forbearance and the merger orders. The FCC must expressly hold that any forbearance does not preempt or

undermine state conditions, obligations or requirements imposed under independent state law, particularly the Pennsylvania-specific conditions imposed in the PaPUC Merger Order.

### **Summary of the PaPUC Reply Comments.**

The PaPUC concludes that the FCC has authority to issue an order and must issue an order. The FCC order must expressly state that any forbearance granted does not preempt or modify any state commission decision, and specifically the PaPUC Merger Order, which imposes conditions, requirements, or other obligations under independent state law.

This clarity is critical. Section 160(e) prevents a state from applying or enforcing any provision of TA-96 that the FCC determined to forbear from applying or enforcing. At best, that provision is a limitation on state enforcement of federal law. Congress never preempted a state from imposing conditions, requirements, or obligations under state law.

The PaPUC Merger Order approved the merger of Verizon and MCI. The PaPUC imposed Pennsylvania-specific conditions under Pennsylvania law. The PaPUC does not want to have those conditions preempted or modified by a federal decision.

The PaPUC imposed Pennsylvania-specific conditions on Verizon mirroring those the FCC imposed in the Verizon-MCI merger Order.<sup>1</sup> The PaPUC did that at PaPUC Docket No. A-310580 on January 11, 2006 (the PaPUC Merger Order).

The PaPUC Merger Order approved the merger, with conditions, because the merger provided substantial benefit to the public as required by state law. The PaPUC conditions incorporated under state law reflect the conditions the FCC imposed when the FCC approved Verizon's merger at WC Docket No. 05-75 by Order released November 15, 2005 (the FCC Merger Order).

The PaPUC Merger Order conditions are under appeal before the Pennsylvania Supreme Court at Docket Nos. 71 MAP 2007 and 72 MAP 2007, respectively. An FCC decision that does not provide this clarity could undermine the PaPUC's ability to defend these Pennsylvania-specific conditions.

The FCC must also act to address how forbearance interacts with prior FCC decisions, specifically the Bell Atlantic-GTE Merger at CC Docket 98-184 (June 16, 2000), the Verizon Merger Order at WC Docket 05-75 (November 17, 2005), and the Fast Packet Pricing Flexibility Order at Docket WC 04-246 (October 14, 2005). The need to explain how forbearance interacts with these prior cases is underscored by the ambiguity on what was decided in this docket.

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<sup>1</sup> The FCC Merger Order incorporated the DOJ conditions in its order. The PaPUC Merger Order incorporated the FCC Merger Order conditions and the Department of Justice (DOJ) conditions.

In addition, the FCC must amend this forbearance to expressly hold that decisions reached in a state proceeding, particularly the Pennsylvania-specific conditions imposed on Verizon in the Pennsylvania Merger Order, are not preempted or modified with this forbearance. That amendment removes any legal doubts on the issue.

The need for clarity also includes, at a minimum, forbearance on the fast packet, special access, wholesale service, and high-speed transmission services identified in this docket. Those issues were also at issue in the merger proceedings, including the PaPUC Merger Order. Equally important, the FCC already provided Verizon pricing flexibility for fast packet services on October 14, 2005 at Docket WC 04-246.<sup>2</sup>

The FCC and the PaPUC imposed conditions on Verizon in their respective merger orders under their respective law as part of a finding of substantial public benefit required by law. This includes conditions on wholesale and special access services.<sup>3</sup> The merger orders imposed conditions relating to high-speed transmission service. The voluntary commitments on

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<sup>2</sup> Compare *In the Matter of Petition for Waiver of Pricing Flexibility Rules for Fast Packet Services and Petition for Forbearance Under 47 U.S.C. § 160(c) from Pricing Flexibility Rules for Fast Packet Services*, WC Docket No. 04-246 (October 14, 2005), paragraph 1 and n. 1 (Verizon granted waiver of rules after forbearance was withdrawn) with *Verizon Ex Parte Notice*, February 7, 2007, p. 2 (first category of forbearance is packet-switched services capable of 200 kbps per second in each direction) and *Verizon Ex Parte Notice*, February 22, 2006, pp. 1-6 (Frame Relay and ATM are “fast packet” services).

<sup>3</sup> *FCC Merger Order*, paragraph 3 and Appendix G (Special Access Conditions) (impact of merger on wholesale Type 1 special access warrants conditions); *PaPUC Merger Order*, pp. 32-33 (adopted and incorporated the FCC and DOJ conditions as Pennsylvania-specific conditions).

peering arrangements and net neutrality principles involving internet service reflect those conditions.<sup>4</sup>

Finally, the FCC has to reconcile this forbearance with any decision made in the pending McLeod Petition. The McLeod Petition questions the *Omaha Forbearance Order* at WC Docket No. 04-223. The FCC will also have to do the same in the pending forbearance proceedings for the Philadelphia and Pittsburgh areas in WC Docket No. 06-171 and the Special Access Notice of Proposed Rulemaking (NPRM) (WC Docket No. 05-25, RM 10593).

### **Extended Discussion**

*The FCC's Legal Authority to Issue an Order.* The PaPUC disagrees with interpretations of law concluding that the FCC cannot issue an order or clarify, modify, or amend an order when forbearance is granted by operation of law. The FCC has this authority because a contrary result is inconsistent with prior practice and general administrative law.

The FCC should adopt the legally sound view and review this forbearance. The FCC must clarify, modify, or amend this forbearance given the uncertainty about what was decided, the need to reconcile this forbearance with state and federal merger orders, the need to clarify that forbearance does not preempt state decisions based on independent state law, and to be able to reconcile this decision with future decisions in several pending proceedings.

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<sup>4</sup> *Id.*, *Applicants' commitments (FCC Merger Order); PaPUC Merger Order*, pp. 32-33.

The FCC must reject AT&T's interpretation regarding forbearance by operation of law. AT&T argues that forbearance by operation of law precludes the FCC from ever again acting on the forbearance result. This interpretation invites the FCC to rewrite federal legislation through inadvertent or unavoidable inaction. The FCC's decision was just an agency decision and not a Congressional action.

The PaPUC also rejects the interpretation that this forbearance is not subject to judicial review. If a statute authorizing a federal agency to act can be reviewed in federal court, an agency decision made under that statute is not beyond judicial review.

Moreover, Section 160(e) operates as a limit on state enforcement of federal law not on state enforcement of state law. The forbearance provisions contain no express language holding that forbearance by operation of law can not be revisited, is not subject to judicial review, and includes all decisions arising under independent state law. The FCC must reject AT&T's invitation to append its views as new provisions to Section 160(a)-(e) of TA-96.

This interpretation also contradicts prior FCC interpretations, including the FCC's interpretation in its brief in *Core v. FCC*, 455 F.3d 267 (D.C. Cir 2006). In that brief, the FCC concludes that it retains authority to act on a petition after the deadline. That includes this forbearance decision.

*Forbearance and the PaPUC Merger Order.* The PaPUC urges the FCC to expressly state that any forbearance granted does not undermine or

preempt state-specific conditions or requirements or obligations imposed by a commission under independent state law. This must specifically include the Pennsylvania-specific conditions imposed on Verizon in the PaPUC Merger Order.

The PaPUC takes this position because the PaPUC is defending the validity of the PaPUC Merger Order and these conditions in Pennsylvania's Supreme Court. Any forbearance granted by the FCC must expressly retain all Verizon merger conditions. This is needed in order to respond to claims that invalidation of the merger conditions somehow makes the PaPUC Merger Order insufficient under Pennsylvania law.

Verizon claims this forbearance proceeding is not like the Verizon-MCI merger proceeding.<sup>5</sup> A comparative analysis of pleadings in several dockets appears to undermine that view. A detailed analysis of the conditions the PaPUC is defending and how this forbearance adversely impacts the PaPUC Merger Order is set out below.

First, Verizon seeks forbearance for "fiber facilities" in the pleadings and notices in this docket. However, in the FCC and PaPUC merger orders, Verizon was required to specifically exclude fiber-based collocation arrangements established by MCI or its affiliates in identifying the wire centers in which Verizon claimed there was no impairment pursuant to the Commission's rules.<sup>6</sup>

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<sup>5</sup> *Verizon Ex Parte Notice*, February 7, p. 14; *Verizon Ex Parte Notice*, March 13, 2007.

<sup>6</sup> Compare *Verizon Ex Parte Notice*, WC Docket No. 04-440, February 7, p. 3 (the second category of forbearance that would allow pricing flexibility includes optical facilities using standards that transmit communications signals over fiber-optic facilities") with *FCC Merger Order*, WC Docket No. 05-75, paragraph 3 and Appendix G (conditions address



Second, Verizon seeks forbearance for Optical Carrier (OC) services. Both the FCC and the PaPUC merger orders addressed special access OC(n) service as Condition 5 of the Special Access conditions in the merger orders.<sup>7</sup> Those conditions continue for 30 months following the Verizon Merger Closing Date of January 6, 2006,<sup>8</sup> or approximately until June 6, 2008.

Third, Verizon seeks forbearance for services provided at wholesale. However, wholesale Special Access conditions 3, 4 and 5 in the merger orders continue for 30 months and 45 days from Verizon's Closing Date on January 6, 2006.<sup>9</sup> Condition 3 prohibits Verizon from providing special access offerings to their wireline affiliates that are not available to other similarly situated special access customers on the same terms and conditions. Condition 4 requires Verizon to offer any new or modified tariffed service to an unaffiliated customer other than SBC/ATT before it is offered to Verizon's affiliate.

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Type 1 wholesale special access and requirements to not increase DS1 and DS3 wholesale access rates, not provide special access offerings to wireline affiliates not available to other similarly-situated special access customers, and certify that before Verizon offers a new or modified contact tariffed service to their affiliate they will also offer it to a non-affiliate other than SBC/ATT).

<sup>7</sup> The federal courts have previously reversed the FCC for failing to conduct an appropriate financial impact analysis. The Office of Advocacy of the United States Small Business Administration has a considerable legal claim that the FCC's "forbearance by law" decision was made without considering the economic impact on small business as required by the Regulatory Flexibility Act. *Comment of Office of Advocacy, Small Business Administration*, Docket No. 04-440, August 13, 2007, p. 2.

<sup>8</sup> Compare *Verizon Ex Parte Notice*, WC Docket No. 04-440, February 7, 2006, p. 6 and 10 (Forbearance from Title II common carrier obligations would extend to OC(n) because OC(n) is competitive and comes within the category of those purchases made predominantly by enterprise customers although wholesale customers will be included as well) with *FCC Merger Order*, Docket No. WC 05-75, Appendix G, Special Access, Condition 5; *Verizon Petition for Allowance of Appeal*, Pa. Supreme Court Docket Nos. 71 MAL 2007 and 72 MAL 2007, p. 5.

<sup>9</sup> Compare *Verizon Ex Parte Notice*, WC Docket No. 04-440, February 7, 2006, p. 7 with *FCC Merger Order*, Docket No. 05-75, Appendix G, Special Access conditions.

Condition 5 prohibits increases in rates for DS1, DS3, and OC(n) special access services that Verizon ILECs offer in their local service territories. These conditions generally extend for 30 months from the January 6, 2006 Closing Date, or approximately until June 6, 2008.

Fourth, Verizon seeks forbearance for “high speed transmission” services. However, Conditions 1 and 2 on Internet Backbone conditions (a “high speed” transmission service) require Verizon to maintain for three years after the Closing Date at least as many settlement free peering arrangements for Internet Backbone service with domestic operating entities as on the Closing Date.<sup>10</sup> Verizon must also post its Internet peering policy or policies on a publicly available website.

Fifth, Verizon seeks forbearance in order to replace cumbersome Title II tariffing obligations with an option to provide flexible private contractual arrangements as well.<sup>11</sup> The merger order conditions, however, demonstrate that Verizon is committed to abiding by the FCC’s “net neutrality” principles published in Docket No. CC 02-33 on September 23, 2007.<sup>12</sup> This includes a commitment to ensuring that there is competition among network providers.<sup>13</sup> There is a direct contradiction between this forbearance and

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<sup>10</sup> Compare *Verizon Ex Parte Notices*, WC Docket No. 04-440, February 7, 2007, p. 2, February 22, 2007, pp. 7-18 with *FCC Merger Order*, WC Docket 05-7, Appendix G, Internet Backbone conditions and OPASTCO Comment, August 17, 2007, p. 6.

<sup>11</sup> *Verizon Ex Parte Notices*, WC Docket No. 04-440, February 7, 2007, p. 2; March 13, p. 2.

<sup>12</sup> *FCC Merger Order*, WC Docket 05-75, Appendix G, Net Neutrality Conditions.

<sup>13</sup> *Net Neutrality Policy Statement*, CC Docket No. 02-33, FCC 05-151, September 23, 2005, paragraph 4.

comments alleging that forbearance will adversely impact small Internet Service Providers (ISPs).<sup>14</sup>

*Additional Unresolved Issues.* The PaPUC identifies several unresolved issues that warrant further examination. First, the FCC needs to clarify that forbearance “by operation of law” is not precedent for any forbearance proceedings at the FCC, including the “me too” petitions and the McLeod Petition.<sup>15</sup>

The FCC also needs to examine the apparent inconsistencies between this forbearance and the merger orders. In this forbearance proceeding, Verizon claimed that to the extent CLECs rely on OC(n) services, the Commission already decided that competing carriers can deploy OC(n) themselves or obtain it from a third party.<sup>16</sup> In the merger orders, the conditions include a prohibition against increases in the interstate rate for OC(n) service for 30 months after the Closing Date,<sup>17</sup> or approximately until January 6, 2008.

If competition exists as Verizon alleged in its forbearance *ex parte* notices, Verizon undermined its ability to compete against these providers by agreeing to an OC(n) condition that imposed a price freeze for OC(n) services. There would have been no need for such a disadvantageous condition to alleviate concerns of the DOJ and FCC about adverse competitive impact if competition were that robust.

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<sup>14</sup> *Comment of Office of Advocacy, Small Business Administration*, Docket No. 04-440, August 13, 2007, p. 2.

<sup>15</sup> *Verizon Ex Parte Notice*, WC Docket No. 04-440, March 13, 2006, pp. 2-3.

<sup>16</sup> *Id.*, p. 3.

<sup>17</sup> *FCC Merger Order*, WC Docket No. 05-75, November 17, 2005, Appendix G, Special Access Conditions, Condition 5; PaPUC Merger Order, pp. 32-33.

On the other hand, if competition is not as prevalent in the special access markets for OC(n) service as is claimed, the need for such an OC(n) service rate freeze was critical in an order approving a merger. Such an important condition must not be abandoned with a forbearance that fails to address the impact on merger conditions.

The FCC must also examine Verizon's claim that forbearance applies largely to enterprise customers when Verizon admits that there is an impact to some of its wholesale access customers.<sup>18</sup> This "minimal impact to wholesale customers" claim contradicts the federal agencies' conclusions that the merger's impact on Type 1 wholesale special access justified conditions so that the federal agencies could approve a merger that would otherwise not have been approved.<sup>19</sup> Verizon provides no explanation why a conclusion supporting a condition in a merger proceeding due to adverse competitive impact justifies forbearance in a forbearance proceeding due to the presence of robust competition.

The FCC must examine the relationship between this forbearance and UNE conditions addressed in the *Bell Atlantic-GTE Merger Order*, CC Docket No. 98-184 (June 16, 2000), particularly Paragraph 316.<sup>20</sup>

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<sup>18</sup> *Verizon Ex Parte Notice*, WC Docket No. 04-440, February 7, 2007, p. 6.

<sup>19</sup> *FCC Merger Order*, WC Docket No. 05-75, November 17, 2005, paragraph 3 and Appendix G, *Special Access conditions*.

<sup>20</sup> *Bell Atlantic-GTE Merger Order*, CC Docket 98-184, 15 FCC Rcd 14032 (2000), paragraph 316 (*BA-GTE Merger*, emphasis added). The complete language of Paragraph 316 provides as follows:

316. *Offering of UNEs*. In order to reduce uncertainty to competing carriers from litigation that may arise in response to our orders in the UNE Remand and Line Sharing proceedings, from now until the date on which the

Paragraph 316 recognizes the “uncertainty to competing carriers from litigation that may arise in response to [the Commission’s] orders in the UNE Remand and Line Sharing proceedings” and approved a BA-GTE commitment that “from now until the date on which the Commission’s order in those proceedings, and any subsequent proceedings, become final and non-appealable” Verizon would “continue to make available to telecommunications carriers, in accordance with those orders, each UNE and combination of UNEs that is required under those orders, until the date of entry of any *final and non-appealable judicial decision* that determines that Bell Atlantic/GTE is not required to provide the UNE or *combination of UNEs* in all or a portion of its operating territory.”

The Verizon-MCI merger orders arguably constitute one such “subsequent proceeding” that has not yet been the subject of a final judicial order, at least in Pennsylvania where appeals on the merger are pending under independent state law. The Verizon-MCI merger orders also arguably constitute a subsequent proceeding addressing UNE conditions in considerable detail, at least as reflected in the conditions imposed by

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Commission's orders in those proceedings, and any subsequent proceedings, become final and non-appealable, Bell Atlantic and GTE will continue to make available to telecommunications carriers, in accordance with those orders, each UNE and combination of UNEs that is required under those orders, until the date of any final and non-appealable judicial decision that determines that Bell Atlantic/GTE is not required to provide the UNE or combination of UNEs in all or a portion of its operating territory. This condition only would have practical effect in the event that our rules adopted in [\*33] the UNE Remand and Line Sharing proceedings are stayed or vacated. Compliance with this condition includes pricing these UNEs at cost-based rates in accordance with the forward looking cost methodology first articulated by the Commission in the *Local Competition Order*, until the date of any final and non-appealable judicial decision that determines that Bell Atlantic/GTE is not required to provide such UNEs at cost-based rates.

Pennsylvania and the FCC in their merger orders. No Verizon notice or pleading in this forbearance proceeding addresses or explains how the ongoing conditions in this earlier *BA-GTE Merger Order* are impacted by forbearance.

There does not appear to be any final and non-appealable judicial decision that permanently altered the *status quo* as required by Paragraph 316 in the *BA-GTE Merger Order*. Even if there had been a final decision that Verizon could point to, Verizon effectively resurrected UNEs by agreeing to UNE conditions as set out in Appendix G of the FCC Merger Order and incorporated by the PaPUC in its merger order. Moreover, the UNE conditions resurrected in the Verizon-MCI merger orders will continue for at least 30 months, beginning from January 6, 2006.

Verizon provides no explanation why Paragraph 316 no longer applies. Verizon does not seem to recognize that UNE commitments set out in merger orders may warrant consideration of UNEs in Verizon's service territories, notwithstanding forbearance.

This is an important consideration for the PaPUC. The PaPUC relied on state authority to approve a merger decision that imposed federal conditions as state-specific conditions. Forbearance must not undermine those conditions in any way.

Finally, the FCC must outright deny Verizon's requests regarding forbearance for fast packet service. Verizon has not adequately explained if and how the pricing flexibility granted for fast packet service in Docket 04-

246 somehow justifies forbearance in this docket. There is no reason why “fast packet” forbearance is appropriate here, particularly given that the pricing flexibility Verizon received in Docket No. WC 04-246 was granted after Verizon withdrew forbearance in that docket.

The PaPUC remains concerned that any “fast packet” in this forbearance docket must not act to undermine the conditions addressing fast packet services, such as “high transmission” conditions in the merger orders. The PaPUC also imposed special access conditions as Pennsylvania-specific conditions. Those conditions must also not be preempted or obviated by any forbearance as well.

If the FCC decides to affirm this forbearance, the FCC must deny the remaining “me too” petitions seeking forbearance as well as any other forbearance requests that rely on this proceeding as precedent. Such a result discourages petitioners from relying on forbearances granted by operation of law as precedent. The PaPUC submits that forbearance obtained by operation of law should have no value as precedent in future forbearance requests.

Moreover, forbearance by operation of law cannot by any stretch be considered a reasoned and well-detailed substantive decision. In fact, such a result may be the exact opposite because there was no majority for any definite substantive decision. Consequently, any FCC affirmation must, at a minimum, expressly state that existing state conditions, particularly the Pennsylvania-specific conditions, are not impacted. A decision by operation of law at the federal level which is devoid of reasoned analysis because of

structural circumstances must not encourage claims that conditions imposed in Pennsylvania after a detailed and well-reasoned analysis are irrelevant or, worse, overturned when those conditions support a finding that the public will benefit in a substantial way from a merger as required by Pennsylvania law.

The FCC should also preserve state conditions in the pending Verizon Forbearance Petitions for the Philadelphia and Pittsburgh MSAs in WC Docket No. 06-172. This is a concern to the PaPUC because forbearance increases the risk of later claims by Verizon that forbearance overturns Pennsylvania-specific conditions.

The FCC should also take this approach for another reason related to forbearance and the merger orders. Verizon's *ex parte* notices in this docket presented a new view of OC(n) service as competitive, directly contradicting the FCC's conclusions in its merger order. In this proceeding, Verizon claims that OC(n) special access is competitive since one can obtain it from multiple suppliers whereas the FCC concluded in the merger order that conditions on OC(n) service were necessary because of adverse competitive impact. The competitive impact was reduced by conditions that allowed the FCC to approve a merger it would not otherwise have approved.<sup>21</sup>

Verizon must not be allowed to avoid this issue by frequent references to earlier decisions in the *Triennial Review Orders* and the *Wireline Broadband Order* throughout their filing. Verizon does not provide a detailed

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<sup>21</sup> Compare *Verizon Ex Parte Notice*, WC Docket No. 04-440, March 13, 2006, p. 3 with *FCC Merger Order*, WC Docket No. 05-75, November 17, 2005, Paragraph 3 and Appendix G, Special Access Conditions, Condition 5.



explanation addressing how those earlier decisions, which are far less specific than the merger order conditions, significantly modify the merger orders, particularly the Pennsylvania-specific conditions on OC(n) access in the PaPUC Merger Order.

### **Conclusion**

The FCC has legal authority to issue an order involving forbearance by operation of law. The FCC must issue an order addressing forbearance to provide clarity and address the relationship between forbearance and the merger orders.

The FCC order must clearly state that forbearance does not preempt state conditions, requirements, or obligations imposed under independent state law. The FCC order must clearly state that forbearance does not preempt, obviate, or overturn the Pennsylvania-specific conditions imposed on Verizon in the PaPUC Merger Order.

The PaPUC thanks the FCC for providing the PaPUC with an opportunity to file a Reply Comment.

Respectfully submitted,  
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